Supreme Court of the United States

OCTOBER TERM, 1944.

No. 177.

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, *EX REL*, AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, PETITIONERS,

versus

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

M. G. WALLACE,
Federal Reserve Bank of Richmond, Richmond 13, Virginia,
R. H. DYE,
First and Citizens Bank Building, Fayetteville, North Carolina,
Counsel for Respondents.

RICHMOND PRESS, INC., PRINTERS

SUBJECT INDEX.

TABLE OF AUTHORITIES.

CASES:

STATUTES.

RULES OF CIVIL PROCEDURE.

Supreme Court of the United States

No. 177.

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, *EX REL,* AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, PETITIONERS,

versus

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

SUPPLEMENTAL STATEMENT OF FACTS.

Since the petition was filed in this case, the opinion of the Circuit Court of Appeals has been published, and appears in 142 Fed. (2d) page 147.

The basic thesis upon which petitioners rely appears to be that a receiver appointed in a proceeding to foreclose a mortgage is the alter ego of the party upon whose motion he is appointed so that it is incumbent upon such party to see to it that a proper person is selected as receiver; that a sufficient bond is given and that the receiver manages the property in a prudent and proper manner. Our contention is that in North Carolina a receiver is appointed only when a court, in the exercise of its discretion deems it proper. The Receiver is, therefore, under the control of the court, not of the parties, so that no party is responsible for his acts, although any party may confer with him or make known to him the wishes and desires of the party with respect to the management of the property in his possession.

The statement of facts in the petition for *certiorari* giving the substance of the allegations of the complaint is correct in so far as it goes, but there are certain additional points concerning the allegations of the complaint, or more accurately the absence of allegations from the complaint, which we deem significant.

The complaint in the action does not deny that the Superior Court of Bladen County had jurisdiction of the parties and of the subject matter, and does not deny that the court proceeded according to the law of North Carolina, which gives to the court the right to determine whether or not any receiver shall be appointed, and affords to the defendant an opportunity to be heard as to the appointment of the receiver, the qualifications of the receiver, the amount of bond to be given and the instructions to be given to the receiver. The complaint does not allege that there was any fraud or concealment practiced upon the court. In the absence of any such allegations, the plaintiff must be deemed to have admitted that Robert L. Steele, III, had a full opportunity to be heard as to the propriety of appointing a receiver, the qualifications of the person to be appointed, the amount of bond to be required and the in-

structions to be given, and that Robert L. Steele, III, did not see fit to avail himself of such opportunity.

There is no allegation that the suit in Bladen County, North Carolina, in which the receiver was appointed, has been dismissed, or that the order appointing the receiver has been reversed, modified or vacated. Indeed, it affirmatively appears from the complaint that three and one-half years after the appointment of the receiver he was still acting. (Complaint paragraph 14, Record, p. 7.) It must, therefore, be deemed admitted that the order appointing the receiver, fixing the amount of his bond and giving him instructions, remains in full force and effect.

While it is stated in the complaint that the receiver did not act with an "impartial and independent discretion", (Complaint paragraph 8, Record, p. 3) these are mere words of characterization and color. There is no allegation of any act done by the receiver which showed partiality, for obviously the alleged negligent operation of the sawmill and the failure to effect insurance were not, and could not have been, particularly beneficial to the mortgagee. There is no allegation in the complaint that the receiver did anything contrary to the express directions of the order of the court appointing him, and there is no allegation that he was directed by the court to take out insurance.

There is no allegation of any act done by the banks tending to coerce, intimidate or mislead the receiver, and no suggestion of any means whereby the banks could exercise control over a receiver appointed by the court. The allegation in the complaint, taken as amended, concerning the wrongful interference with the receiver by the banks (Record, p. 12), is no more than a conclusion of the pleader, for the specific allegation that the banks instructed the receiver not to effect insurance cannot be construed as meaning more than that the banks made known their wishes in this respect to the receiver, since there is no allegation as to anything done by the banks to coerce or compel the receiver to comply.

In respect to the motion to amend, the complaint shows

that a prior action for the same cause of action was instituted by the plaintiff against the defendants on April 25, 1942, and was dismissed on motion of the plaintiff on September 8, 1942 (Complaint paragraph 14, Record, p. 6). The complaint in the instant action was verified July 3, 1943 (Record, p. 7). The order dismissing the complaint in this action was entered at a hearing on August 26, 1943 (Record, p. 11), at which plaintiff was represented by two counsel. When the judgment was entered plaintiff apparently made no request for leave to amend. The motion of September 8, 1943, was described as a motion to amend the complaint (Record, p. 11) and was accompanied by no showing of mistake, inadvertence, surprise or excusable neglect in connection with the judgment entered on August 26th.

The amendment, if made, would have done no more than change the emphasis in the allegations of the complaint, for the original complaint alleged that the receiver acted in conformity to the desires and directions of the defendants (Complaint paragraph 8, Record, p. 3), and that he failed to obtain and keep in effect fire insurance (Complaint paragraph 9, Record, p. 5). The complaint if amended would only have changed this language so as to state that the receiver failed to effect insurance on the property and that the banks requested or directed him not to do so.

II.

ANSWER TO POINTS I AND II OF BREIF FOR PETITIONERS.

(Petitioners' Brief, pp. 14-16).

Since both points I and II in the brief for the petitioners deal with the construction of the Rules of Civil Procedure, we believe it will be advisable to discuss these points as one.

As we stated, the motion of September 8th was presented to the trial court as a motion to amend a pleading

in a pending case, apparently invoking the discretionary power given to the court by Rule 15. That rule apparently deals only with amendments before judgment, for it refers to no amendments after judgment except formal amendments designed to conform pleadings to proof which do not affect the judgment (Rule 15(b)). The rule certainly does not appear to have been designed to allow a litigant to reopen for further litigation any matter of fact or of law once decided. Obviously, therefore, the motion could not have been acted on as one to amend a pleading, but in order to have entertained it, the court would have been obliged to have treated it as an application to vacate a final judgment. Petitioners now appear to concede this, and contend that the motion should have been regarded as one made under Rule 59 or Rule 60(b).

Rule 59 allows a judgment in an action tried without a jury to be reopened only for the reasons for which before the adoption of the Rules of Civil Procedure rehearings were granted in suits in equity in courts of the United States. We have found no case suggesting that the desire of a party to amend his pleadings was ever regarded as a reason for allowing a rehearing in a suit in equity. In any event, a motion under this Rule, not based on newly discovered evidence, must be made within ten days after the entry of judgment. Rule 59, therefore, can have no application.

Rule 60(b) is limited to cases in which the judgment, order or proceeding was taken through mistake, inadvertence, surprise or excusable neglect. A motion under this rule, supported by proper showing, is of necessity addressed to the sound discretion of the trial court, but we submit that it would be an abuse of discretion for the trial court to presume the existence of facts showing mistake, inadvertence, surprise or excusable neglect in the absence of even a suggestion from the complaining party that such facts existed. We submit, therefore, that the court could not, under Rule 60(b), have properly granted the motion as made.

We suggest that the references of the Circuit Court of Appeals to the discretion of the trial court were directed to the fact that, had the Trial Judge been of the opinion that substantial justice required it, he could have made inquiry as to the possible existence of "inadvertence", or "excusable neglect", which caused the plaintiff to fail in two attempts to state his case in the manner in which he desired to state it. Certainly the trial court was not required to initiate such an inquiry when the plaintiff made no offer to explain the reason for the neglect.

It is clear, however, that both of the lower courts were convinced that the allowance of the amendment was not necessary to attain substantial justice because the facts stated in the complaint as amended were not essentially different from those stated in the complaint before amendment (Record, pp. 13, 19, 22, and 142 Fed. (2d) 149-150). We will, therefore, follow the lead of the lower courts and consider the plaintiffs cause of action as if the amendment had been allowed.

III.

ANSWERS TO POINT III OF BRIEF OF PETITIONERS.

(Petitioner's Brief, pp. 16-21).

A.

Statutes of North Carolina Concerning the Appointment of Receivers and Their Powers.

Petitioners appear to concede that the question as to whether the complaint states facts upon which relief can be granted depends entirely upon the application of the law of North Carolina. We, of course, concur in this view. While the law of North Carolina upon the subject of the appointment of receivers and their powers and duties is generally similar to the rules applied in almost all states,

in North Carolina these subjects are to a large extent regulated by statutes. For the convenience of the court we quote at length certain sections of Michie's Code of North Carolina for 1939 which we consider pertinent to the case.

Michie's Code of North Carolina, 1939:[1]

"Sec. 848. *Not issued for longer than twenty days without notice.*—No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court of not less than two nor more than ten days."

"Sec. 851. *What judges have jurisdiction.*—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order."

"Sec. 856. *Issued without notice; application to vacate.*—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such appli-

[1]The Sections of Michie's Code of North Carolina, 1939, quoted below, now appear as Sections 1-490, 1-493, 1-498, 1-501, 1-502, 1-504; and 55-148 General Statutes of North Carolina, 1943.

cation is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit."

"Sec. 859. *What judge appoints.*—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions."

"Sec. 860. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgments upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receiver; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be to receivers appointed hereunder."

"Sec. 862. *Receiver's bond.*—A receiver appointed in an action or special proceeding must, before enter-

ing upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver." (Section 339 permits the acceptance of a surety company instead of the two sureties mentioned.)

"Sec. 1209. *Powers and bond*.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by

> the corporation, if in being, that are necessary for the final settlement of its unfinished business.
>
> The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes."

Petitioners appear to lay some stress upon the point that in some jurisdictions the powers and duties of a receiver appointed in a suit to foreclose a mortgage differ from those of a receiver appointed in other cases. It is obvious from a reading of the statutes of North Carolina that such a distinction is unknown in that state. Section 860 makes applicable to all receivers the sections of the Chapter of the Code of North Carolina entitled "Corporation dealing with Receiverships". Section 1209 is a part of that chapter and so defines the powers of all receivers.

It has frequently been held in North Carolina that a motion for the appointment of a receiver, whether in a suit to foreclose a mortgage or in any other type of suit, is addressed to the sound discretion of the court, and that no party may, as a matter of right, demand that a receiver be appointed (*Whitehead* v. *Hale*, (Sup. Ct. N. C. 3-31-96), 118 N. C. 601, 24 S. E. 360), so obviously no party can require the court to appoint a particular person as receiver.

Under the plain terms of Sections 862 and 1209 only the court can determine the amount of the bond to be given by a receiver, and it is established that even if the court fails to require any bond, the order appointing the receiver is valid, until modified, vacated or reversed. *Nesbitt and Bro.* v. *Turrentine*, (Sup. Ct. of N. C., June, 1880), 83 N. C. 536. Such an order is an adjudication binding on the parties, and not subject to collateral assault.

In *Rousseau* v. *Call* (Sup. Ct. N. C. 5-25-15), 169 N. C. 173, 85 S. E. 414, at page 416, the Supreme Court of North Carolina said:

> "And the court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, if the order was improvidently made, its propriety is not open to question on this suit."

The plain terms of Section 1209 quoted above, show that a receiver in North Carolina holds the property in his custody subject to the direction of the court, hence he cannot be the agent or servant of a party to the litigation, for the parties cannot control him, and it appears from cases cited by counsel for petitioners, as well as from many other cases, that in North Carolina, as in almost all jurisdictions, the power to control is the essential element in the relation of master and servant or that of principal and agent.

B.

North Carolina Decisions Holding That a Receiver is Controlled by the Court—Not the Litigants.

The Supreme Court of North Carolina has frequently had occasion to declare that a receiver is a representative, officer, or "hand" of the court which appointed him.

Simmons v. *Allison* (Sup. Ct. of N. C., 5-19-96), 118 N. C. 761, 24 S. E. 740, at page 740, the Court said:

> "The custody of the receiver is the custody of the law, and the judge had power to instruct the receiver as to the exercise of his duties. He was under the supervision and control of the court."

State v. *Norfolk and Southern R. R. Co.* (Sup. Ct. of N. C. 2-25-10), 152 N. C. 785, 67 S. E. 42, 26 L. R. A. (N. S.) 710, 21 Anno. Cases 692. In this case it was held that a corporation may not be prosecuted on account of the acts of the receiver who was in charge of the property of the corporation. At 67 S. E., page 44, the Court said:

> "A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite,* the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any attempt to disturb his possession or to interfere when he is acting under the authority and orders of the court is contempt, and punishable accordingly."

Gobbel v. *Orrell* (Sup. Ct. of N. C. 11-12-03), 163 N. C. 489, 79 S. E. 957, at page 959, the Court said:

> "The receiver's possession is that of the court taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as it may finally direct."

See also:

State v. *Whitehurst* (Sup. Ct. of N. C. 11-3-37), 212 N. C. 300, 193 S. E. 657, 137 A. L. R. 740.

Blades v. *Hood* (Sup. Ct. of N. C. 6-15-32), 203 N. C. 56, 164 S. E. 828.

Corporation Commission v. *United Commercial Bank* (Sup. Ct. of N. C. 9-24-41), 220 N. C. 48, 16 S. E. (2nd) 473.

Counsel for petitioners cite and rely upon *Vanstory* v. *Thornton* (Sup. Ct. of N. C. 5-5-93), 112 N. C. 196, 17 S. E. 566. We think that an examination of the opinion in this case, particularly the portion quoted by counsel for petitioners, will show that the court held that the default of the receiver did not alter the rights of the parties among themselves. The fact that the receiver had been appointed at the instance of the party on whom the loss primarily fell was immaterial. Such a loss falls upon the parties as their interest may appear. In the instant case the loss occasioned by destruction of the mortgaged property will

fall on the mortgagee, unless other property subject to the mortgage is found sufficient to pay the mortgaged debt, or the estate of the mortgagor is solvent. There is no allegation of either of these facts.

C.

AUTHORITIES FROM OTHER STATES HOLDING THAT A RECEIVER IS NOT THE AGENT OF THE LITIGANTS.

While we believe that an examination of the statutes of the State of North Carolina and the decisions of its court of last resort are themselves sufficient to show the correctness of the decisions of the courts below, we think that the rules applied in North Carolina are, as we have stated, substantially similar to those applied in most jurisdictions, and that therefore the court of North Carolina would regard the prevailing weight of decisions from other jurisdictions and statements found in standard texts as persuasive. As petitioners pointed out in their brief, cases dealing specifically with the question as to whether a party upon whose motion a receiver is appointed is liable for the acts of a receiver are not numerous. The explanation of this appears to be that few litigants have ever advanced such a theory. The basic idea underlying the conception of the nature of a receiver's office is that the receiver is appointed by and responsible to the court, and therefore independent of the parties, so that, indeed, any attempt by any party to interfere with him is contempt of court. As Judge Dobie pointed out, a different concept would frustrate the entire purpose of receiverships, which is to divest all contending parties of the bone of contention and bring it within the impartial control of the court itself.

We refer to the following cases as holding that the party on whose motion a receiver is appointed is not responsible for the receiver's acts.

Atlantic Trust Co. v. *Chapman* (U. S. Sup. Ct. 2-24-08), 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas.

1155. This case holds that the party upon whose motion a receiver is appointed is not responsible for the expenses of the receiver if the fund is insufficient to pay all such expenses. The receiver was appointed on motion of the trustee in a mortgage deed of trust in a suit for foreclosure. The court said, at 208 U. S. 370:

> "We are of opinion that the Court of Appeals erred in holding that the Trust Company (the mortgage trustee) was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver."

In *O'Connell* v. *St. Louis Joint Stock Land Bank* (Sup. Ct. Ark. 3-22-26), 170 Ark. 778, 281 S. W. 385, at page 387, the Court said:

> "The receiver was therefore legally appointed and appellee was not responsible for his conduct in the management and operation of the impounded property. If there were any just complaints against the action of the receiver, the remedy was solely against him and the sureties on his bond."

Robinson v. *Arkansas Loan & Trust Co.* (Sup. Ct. of Ark. 2-18-05), 74 Ark. 292, 85 S. W. 413. In this case Arkansas Loan and Trust Co. brought a suit to foreclose a mortgage given by one Robinson. A receiver was appointed to collect the rents and profits. The receiver embezzled the money collected. The Court said (at 85 S. W. 415):

"He (receiver) was not the agent of either party but an officer of the court, and subject to its control. He and the sureties on his bond are alone responsible for his wrong doing."

Mitchell Machine and Electric Co. v. *Sabin* (Sup. Ct. of Ky. 2-15-27), 218 Ky. 289, 291 S. W. 381. This was a suit brought by one creditor against another. It was alleged that the second creditor had united with a debtor in asking for the appointment of a receiver of the debtor's estate and that this action was collusive. It was alleged that the receiver had mismanaged the estate, and it was sought to hold liable the creditor who had joined in the motion for the appointment of a receiver.

The court held that, since the receiver was appointed by a court of competent jurisdiction, the order appointing him could not be assailed in another court, and said (at 291 S. W., p. 382):

"Though a receiver appointed by the court acts as receiver for all parties interested, he is not the agent of the parties in the sense that each of them is responsible for his acts. *City Savings Bank* v. *Carlon*, 87 Neb. 266, 127 N. W. 161. Therefore, if the receiver did mismanage the affairs of the corporation, the Bank of Smithland was no more responsible for his action than appellant, who is also a party to the proceeding."

City Savings Bank v. *Carlon* (Sup. Ct. of Neb. 6-10-10), 91 Neb. 790, 127 N. W. 161, at page 163, the Court said:

"Of course, a receiver appointed by the court in the progress of litigation acts as receiver for all parties to the litigation and may be said in some sense to that extent to be the agent of all parties, but he is not the agent in the sense that the parties to a litigation have employed him and can control his actions. He is the arm of the court and the parties to the litigation are not necessarily responsible for the wrongs which he may commit as receiver."

Kaiser v. *Keller* (Sup. Ct. of Iowa, 6-28-66), 21 Iowa 95.

Fountain v. *Stickney* (Sup. Ct. of Iowa, 12-18-09), 145 Iowa 167, 123 N. W. 947, 139 A. S. R. 41.

Statements in standard texts to the effect that the parties have no right to control the receiver, so that he cannot be the agent or servant of the parties, are numerous, although the statement is usually made as if it were an elementary proposition and is seldom elaborated. Among the texts containing such statements are:

Restatement of the Law—Agency—Section 14, Volume 1, page 47;

Ruling Case Law—Receivers—Section 2, Volume 23, page 7;

Corpus Juris—Receivers—Section 84, Volume 53, page 73;

High on Receivers, 4th Edition, Section 1, page 2;

Hilgh on Receivers, 4th Edition, Section 270, page 319;

Clark on Receivers, 2nd Edition, Section 38, Volume 1, page 36.

In a note published in the Virginia Law Review for June the decision of the Circuit Court of Appeals has been commended as sound (Virginia Law Review, Vol. 30, No. 3, p. 498).

We submit that the statutes of North Carolina and the decisions of its court of last resort show that in that state the decision to appoint a receiver can be made only by the court; that the person to be appointed can be selected only by the court; that the amount of the bond to be given can be determined only by the court; and that only the court can control or instruct a receiver. It follows, therefore, that a receiver can never be the agent or servant of the party on whose motion the receiver is appointed, and that such party is in no way responsible for the acts of the receiver. We further submit that on these points the law of North Carolina is in accord with the law in almost all other states.

D.

PETITIONERS' AUTHORITIES EXAMINED AND CRITICISED.

Counsel for petitioners' appear to rest their case entirely on the contention that the Supreme Court of North Carolina could be expected to follow a rule at variance with the one followed in the decisions mentioned above and stated as elementary in the texts cited. The rule which petitioners state as the prevailing rule appears to find no support except in *Sorchan* v. *Mayo* (Ct. of Chancery of N. J., 1-9-92), 50 N. J. Eq. 288, 23 Atl. 479, and the Tennessee cases mentioned in the brief of the petitioners. The facts in *Sorchan* v. *Mayo* were peculiar. The receiver before appointment was the agent of the mortgagee and the fact seems either to have been concealed from or at least not disclosed to the court. There is no allegation of any such facts in this case. The decision in *Sorchan* v. *Mayo* was by a single judge, who, in the course of his opinion, concedes that the views which he expresses are at variance with the then extant American authority, and he contends that the generally accepted rule is based upon a misconception of certain early English authorities. The reasoning of the judge in *Sorchan* v. *Mayo* seems to have attracted little attention from other courts. In the fifty years which have elapsed since the case was decided, it has never been cited by any other court except in *Livingston* v. *Bauchens* (Supreme Court of New York Appellate Division, 4-18-38), 254 App. Div. 692, 3 N. Y. S. (2d) 776. In this case there is a mere reference to the New Jersey case without comment or discussion, so it is impossible to tell from the opinion to what effect the New Jersey case is cited. The court of last resort of New Jersey appears to hold a view concerning the office of a receiver inconsistent with the decision in *Sorchan* v. *Mayo*. In *Mortgage Security Corporation* v. *Townsend* (Ct. of Errors and Appeals of New Jersey, 5-18-31), 108 N. J. Equity 264, 154 Atl. 827, at page 828, it is said: "A receiver stands as a representative of

the court impartially between the parties". When *Sorchan* v. *Mayo* is referred to in encyclopedias and texts, it is referred to in footnotes apparently as an exceptional case.

The Judge in *Sorchan* v. *Mayo* cites no American authority as sustaining his position except the Tennessee case of *Terrell* v. *Ingersoll* (Sup. Ct. Tenn., Sept., 1882), 78 Tenn. (10 Lea) 77. This last mentioned case appears never to have been cited on this point by the court of any other state except when cited in *Sorchan* v. *Mayo*. The opinions in the Tennessee case and other Tennessee cases contain no discussion as to the reason for the rule which is applied, and cite no authority from other states. The primary point discussed is the liability of the receiver. When that is determined the court states, as though it were a self evident proposition, that if the receiver is liable the complainant is also liable. The reason obviously is not the fact that the complainant selected the receiver because it is stated as an elementary proposition that the party upon whose motion a receiver is appointed is liable, even though the other party consented to the appointment of a particular person as receiver. (78 Tennessee 86.)

When the Tennessee case was decided, there was in force a statute under which the court appointing a receiver might, if it saw fit, require of the complainant a bond conditioned for the faithful discharge of his duties by the receiver. (Chapter XLVII, Acts of Tenn. for 1833 and Williams Code of Tenn., 1934, Sec. 10.559). We suggest that the explanation of the language of the Tennessee courts is to be found in this statute under which it is probable that in the case before the court the complainant had given a bond conditioned for the faithful performance of the duties of the receiver, so that comment upon the reason for the liability of the complainant was unnecessary.

We submit, therefore, that the Circuit Court of Appeals was clearly right in its conclusion that *Sorchan* v. *Mayo* and the Tennessee cases are at variance with the great weight of American authorities, and would not be re-

garded as even persuasive authorities by the court of North Carolina.

In discussing the question of insurance, counsel for petitioners appear to overlook the established rule referred to by the Circuit Court of Appeals that neither the mortgagee nor mortgagor is under any duty to effect insurance on mortgage property. It is well settled in North Carolina that each has an insurable interest. *Jeffreys* v. *Boston Insurance Co.* (Sup. Ct. of N. C. 3-9-32), 202 N. C. 368, 162 S. E. 761. The institution of a suit for foreclosure or even a sale not confirmed does not terminate the insurable interest of the mortgagor (C. J.—Fire Insurance—Sections 9 and 10, Vol. 26, pp. 28, 29, American Jurisprudence—Section 339-340, Vol. 29, pp. 303-4. The complaint offered no explanation as to why Robert L. Steele, III, failed to effect insurance for his own benefit, if indeed he wished insurance. Counsel for petitioners rely on *Thompson* v. *Phenix Insurance Co.* (Sup. Ct. U. S., 5-19-90), 136 U. S. 287, 34 L. Ed. 408, 10 S. Ct. 1019, as holding that a receiver is always bound to effect insurance on property in his possession. This court did not so hold. In fact it intimated that the contrary was true. The main question before the court was whether or not a receiver could, in the absence of prior authority from the court, effect insurance on property in his possession. The court did not go so far as to pass upon this point but actually held no more than that an insurance company who had written the policy and accepted the premium could not question the authority of the receiver, since the court could at least ratify the act. The only statement with respect to the duty of the receiver is the following statement (136 U. S. 293), "We do not doubt that under some circumstances a receiver would be derelict in his duty if he did not cause property in his hands to be insured against fire." We suggest that the circumstances which the court had in mind are those in which by reason of the multiplicity of the parties in interest, it is impractical for each interested party to protect himself and not cases in which, like the case at bar, each interested party

can readily effect insurance to the extent of his own interest. However, even if we concede, for the purposes of this argument only, that the receiver could, or perhaps should, have effected insurance, the matter was a legitimate one for discussion between the receiver and interested parties. Any party might properly express his wishes to the receiver, who was the "hand" of the court. If the request was ignored his remedy was an application to the judge, who was the head of the court. There is no allegation that Robert L. Steele, III, ever made known his wishes on the subject, either to the receiver or the court.

In conclusion, we submit that the weakness of the case of the plaintiff lies in the inaction of his decedent, Robert L. Steele, III. A receiver under the law of North Carolina is appointed in order that all interested parties may have equal opportunity to be heard as to the custody, management and disposition of the property under the control of the court. Each party may ask for such action as he deems proper. No party has power to do more. Robert L. Steele, III, had the same right and opportunity as the mortgagees to be heard as to the person to be appointed as receiver, the amount of the bond to be required, and the instructions to be given with respect to insurance, or otherwise. For reasons sufficient to himself, he remained inactive, and so his administrator cannot complain of acts in which the decedent acquiesced.

Respectfully submitted,

M. G. WALLACE,
Federal Reserve Bank of Richmond,
Richmond 13, Virginia,
R. H. DYE,
First and Citizens Bank Building,
Fayetteville, North Carolina,
Counsel for Respondents.